1724. *July* 3. The Children and Grandchildren of SIR JOHN LAUDER of Fountainhall, one of the Senators of the College of Justice, by his first Marriage, *against* MR. ROBERT LAUDER, only Son of his second Marriage.

SIR JOHN LAUDER of Fountainhall, by a deed dated the 24th January, 1717, assigned to his daughter Mrs. Marion, and her heirs whatsomever, certain sums due to him extending to 17,500 merks; and by the bond it was provided, "That if she should dispose of herself dishonourably in marriage, she should be restricted to the half, and the other half should pertain to Robert, and Mrs. Helen Lauders, her brother and sister german; reserving to himself a power to alter."

By another deed, dated the 8th of January, 1719, he altered that substitution, and in place thereof appointed, "That failyieing of Marion by decease before her majority, or marriage with consent of friends, the sum assigned to her in name of tocher, should devolve in equal shares amongst his children and grandchildren by his former marriage."

Thereafter, upon the 21st December, 1719, he made a final settlement among his children; wherein about 50,000 merks were given to his other children, distinct from Robert and Marion; in which he revoked all prior writs, and disposed of the sums otherwise than he had formerly done.

Of the same date with this settlement he, by a note on the back of Marion's bond of provision, declared, "That he had revised the same, and found nothing to alter, except that whereas he had assigned to her a bond of 3500 merks which he had since that time transacted and retired, he therefore substituted another bond in its place." And then he adds, "With which alteration I hereby ratify and confirm her bond of provision in all other points as it stands."

In August 1722, he made a new settlement with respect to Marion, revoking her former bond, and in place thereof giving her only 5000 merks, in case she should marry dishonourably, and assigning the rest of her portion to her brother Robert.

Marion died before her majority, and unmarried; and by her testament made over in favours of her brother Robert, the sums contained in her father's bond and assignation.

Of this testament the children of the first marriage, as heirs substituted to Marion, by the deed January 1719, raised a reduction upon this ground, that it was *à non habente potestatem*, and done in prejudice of the substitution in their favours.

The defence offered was, That Marion being fiar by the bond of provision, and having survived her father, she had the absolute disposal of the subjects, notwithstanding the substitution, seeing she was not tied up by any prohibitory clauses; whereby the substitution was of the nature of a *substitutio vulgaris*, and could have no effect.

It was ANSWERED, That the substitution could not be construed a *substitutio vulgaris*, since Marion's liberty was only limited to the time of her minority or being unmarried; which was plainly of the nature of a *substitutio pupillaris*, and was such a restriction of her power, as was sufficient to invalidate any deed she should do within that time, in relation to the disposal of the subjects.

The Lord Newhall Ordinary sustained the reason of reduction.

It was thereafter ARGUED for the defender, That the money belonged to him, as heir whatsoever to his sister, in virtue of the substitution contained in the original bond of provision, which he contended was revived by the note or docquet on the bond: and insisted that these words, "with which alteration, I hereby ratify and confirm the said bond of provision in all other points as it stands;" imported a ratification of the original substitution to heirs whatsomever in the first bond, and an alteration of the substitution made by the separate deed in favours of the children of the first marriage. He founded likewise his pretensions on the deed 1722; from which he alleged, that his father's design of giving Marion's portion to him, did plainly appear.

To which it was ANSWERED, That the occasion of the note or jotting on the bond, was purely on account of the alteration with respect to the 3500 merks uplifted, and in place of which, my Lord had substituted another bond; so that as to the other sums assigned, there was no alteration: and it could not be construed an alteration of the total destination the father had made in January 1719; for it was an uncontroverted rule in law, that where a deed is solemnly and deliberately executed, the same cannot be understood to be revoked by any deed consistent with it, but there must be an express revocation. And the note on the bond being every way consistent with the substitution, in favours of the children of the first marriage, it could not infer a revocation; yea, even in so far as the docquet ratifies the bond, it must be understood to do it only in the shape the bond was then in, viz. limited, explained, and amended by the deed of substitution in January 1719.

As to the settlement in August 1722, it was made with a certain view, and upon a condition which never did exist; for Marion died unmarried, and therefore it could not at any rate influence the present question.

The Lords found, That the settlement and substitution made by the Lord Fountainhall on January 8, 1719, was not altered or revoked by any posterior deed.

Act. Ro. Dundas, *Advocatus;* and Sir Ja. Stewart. *Alt.* Ja. Graham and H. Dalrymple. Lord Newhall, *Reporter.* Hall, *Clerk.* *Page* 65.

1724. *December* 8. JAMES WILLYSON, Merchant in Glasgow, *against* The CREDITORS of DORATER.

IN the ranking and sale of the estate of Dorater, it was disputed betwixt Mr. Willyson, the heir of tailyie, and the creditors of his brother (who had forfeited his right to the estate, as observed 25th June, 1724,) whether or not the estate of Dorater, being tailyied with irritant clauses in the procuratories and precepts, but the tailyie not recorded, in terms of the Act of Parliament 1685, did exclude the creditors from payment of their debts.

The defence made for the heir of tailyie was, That the prohibitive, irritant, and resolutive clauses in the tailyie, being ingrossed in the procuratories of resignation, charters, and infeftments standing upon record, the creditors were not *in*